

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: May 20, 2005

TO : Alan B. Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: International Longshore & Warehouse536-2554-2500-0000
Union, Local 6 (Alan Ritchey, Inc.)548-6050-6701-5000
Case 32-CB-5829 548-6050-6727-0100

The Region submitted this Section 8(b)(1)(A) and (2) case for advice as to whether the Charging Party was a "free rider" so as to excuse the Union of liability for causing her termination for nonpayment of dues and a non-dues assessment, even though the Union may not have fully satisfied the Philadelphia Sheraton¹ notice requirements.

The Region has determined that the Union caused the Charging Party's discharge by failing to meet the Philadelphia Sheraton notice requirements for dues delinquencies, which included nonpayment of a non-dues assessment. We conclude that the Union's liability is not excused by the Charging Party's own conduct, as there is insufficient evidence to support a finding that the Charging Party was a "free rider."

FACTS

Alan Ritchey, Inc. (the Employer) operates a facility in Richmond, California, where it provides contract services to the United States Postal Service. The Charging Party, a quality inspector, has been employed by the Employer since 1991. In 2002, the Employer entered into an initial collective bargaining agreement with International Longshore & Warehouse Union, Local 6 (the Union). The agreement contains a union security provision that states that uniform tender of the Union's periodic dues and initiation fees are required as a condition of retaining membership in the Union. The Union security provision also provides that the Employer, at the Union's request, shall discharge any employee who fails to uniformly tender the periodic dues and initiation fees as required by the Union within seven calendar days after receipt of notice.

In January 2003, the Union began implementing the contractual dues checkoff provisions by distributing

¹ 136 NLRB 888 (1962), enfd. 320 F.2d 254 (3rd Cir. 1963).

checkoff authorization cards to unit employees, including the Charging Party. The following month, the Union's shop steward informed employees that the signed authorization cards were misplaced and asked employees to sign new cards. The Charging Party signed a second checkoff authorization card. The Union and Employer continued to experience problems in tracking employee dues deductions. In February 2004,² in response to continuing employee concerns about dues deductions,³ the Employer enclosed with each employee's paycheck a written record of that employee's payment of Union dues. The Charging Party's record showed her to be delinquent in Union dues.

On March 26, the Union sent letters to the Charging Party and other employees who were delinquent in their dues, informing them of their arrearages and requesting that they make payment arrangements with the Union. The Charging Party denies receiving this letter but was aware that other employees did receive a letter from the Union.

The Union provided a copy of the March 26 letter it claims to have sent to the Charging Party. The letter shows that the Charging Party owed a total of \$254.04, her monthly dues rate was \$39.38, and that her dues were paid through September 30, 2003. The Charging Party's balance of \$254.04 included a one-time \$40.00 assessment implemented by the Union in order to address the Union's financial needs. The letter also set a deadline of April 16 for the Charging Party to pay her due arrearages or else a "letter will be sent to your Employer demanding termination of your employment in accordance with the contract." The Union took no action on April 16.

On April 27, the Union sent a letter to the Employer and the Charging Party, who acknowledges receiving this notice. The letter requested that the Charging Party be discharged, based on her failure to pay dues in accordance with the Union security provision, within five business days (i.e. by May 4). The letter asserts that the Charging Party's arrearage had risen to \$293.42, her monthly dues rate was \$39.38, and that her dues were paid through September 30, 2003. This total arrearage again included the Union's \$40.00 assessment.

² All dates hereinafter are 2004, unless otherwise noted.

³ The Charging Party was one of the many employees who inquired about the status of her dues account with the Union.

On April 30, the Charging Party telephoned the Union dues clerk. The Charging Party asserts that the dues clerk informed her that she owed \$184.00 in past dues. According to the Charging Party, she told the Union dues clerk that she did not have the all the money immediately available, but agreed to pay down her arrearage by paying some money at that time and additional money the following week.

The Union dues clerk agrees that the Charging Party called on April 30, but has a different recollection of the conversation. The dues clerk states that she cannot remember exactly what total she told the Charging Party that she owed, but by her best estimate the total was \$254.04. The dues clerk says she arrived at that figure by subtracting \$39.38 (April's dues) from the \$293.42 figure contained in the Union's April 27 notice. The dues clerk asserts that during the course of the conversation, the Charging Party stated she refused to pay any amount of her dues arrearage. The dues clerk has presented computer notes that corroborate a conversation took place on April 30 and that the dues clerk gave the Charging Party a breakdown of the dues owed. The computer notes do not, however, indicate the total owed by Charging Party, the dues clerk's calculations, or any comments made by the Charging Party.

The Union dues clerk also asserts that the Charging Party called the Union on May 3, the day before the scheduled discharge. The dues clerk believes she told the Charging Party that she owed \$254.04 and had to pay by the next day or she would be terminated. In this regard, the dues clerk sent the Employer a fax stating that if payment was not received from the Charging Party by the next day, a termination notice would follow. Again, the dues clerk's computer notes reflect that a conversation took place on May 3, but do not contain specific information as to the subject matter of the conversation.

The Charging Party was not discharged on May 4 as the Union dues clerk was ill and unable to send out the termination notice during her May 4-May 10 absence.

The Charging Party asserts that on May 7, she drafted two checks made out to the Union that would cover her arrears. The first check, dated May 7, was for \$100.00 and the second check, dated May 14, was for \$84.00. The Charging Party asserts she never agreed to a specific payment plan with the Union, but only to pay some amount of money in the first week of May and some in the second week. The Charging Party asserts that she chose the amounts of the payments based on the funds available in her checking account. The Charging Party asked her husband to prepare the envelopes for the checks and provided him with a piece

of paper on which she had handwritten the Union's address. Only later, after the envelopes were returned near the time of the Charging Party's discharge, did the Charging Party allegedly discover that her husband wrote the incorrect address on both envelopes⁴ and inadvertently failed to put a check in the May 7 envelope. The Charging Party's husband attempted to correct his error of failing to put a check in the May 7 envelope by placing both checks in the incorrectly addressed May 14 envelope.

According to the Charging Party, on May 7 she also hand delivered a \$25.00 check to the Union office. Arriving after the office was closed, she slipped an envelope containing the \$25.00 check and a handwritten note under the door. The handwritten note criticized the Union's actions regarding the dues checkoff system and warned, "Don't you dare hold my job over my head again when its [sic] your fault everyone [sic] dues are backed up."

When the Union dues clerk returned from sick leave on May 11, she posted the Charging Party's \$25.00 payment to her account. On May 12, the dues clerk received two phone calls from the Union shop steward. In the first conversation, the Union steward told the dues clerk that the Charging Party could not pay the full amount owed. The dues clerk replied that the Union could not wait any longer for the Charging Party to pay her dues, and noted that since she was sick the first week of May and unable to request the Charging Party's discharge, the Charging Party already had the benefit of an extra week to make payment. The dues clerk stated that she would talk to the Union's secretary/treasurer.

Later on May 12, the Union steward called again, stating that the Charging Party wanted a payment arrangement. The Union steward, the dues clerk, and the Union secretary/ treasurer continued the conversation by speakerphone. At this point the dues clerk stated that the Charging Party owed \$184.10.⁵ There was no discussion

⁴ The address on the envelopes read "Local 6, 623 2nd Ave., Oakland, CA 94621". The Union's correct address is 99 Hegenberger Road, Oakland, CA 94621.

⁵ The dues clerk's affidavit explained that the \$184.10 figure was calculated by taking the \$254.04 amount set forth in the Union's March 26 notice then deducting the following amounts: \$25.00 for the payment the Charging party made in early May; \$42.16 for the monthly dues checkoff payment that the Union had received from the Employer following the March 26 notice; and \$2.78 which the Union decided to treat as an overpayment of dues.

regarding how she arrived at this figure. The Union steward stated that the Charging Party could pay \$100.00 by May 14 and the balance by the following Friday, May 21. The Union secretary/treasurer agreed to the arrangement on behalf of the Union. The dues clerk advised the Employer of the payment plan and asked the Employer to hold off on terminating the Charging Party.

The Union steward testified that after arranging the payment schedule with the Union, she immediately called the Charging Party and told her that she had to have \$100.00 to the Union by Friday (May 14) and the rest by the following Friday (May 21). According to the Union steward the Charging Party stated that she didn't have the money and was not going to pay. On the afternoon of Friday, May 14, the Union steward asked the Charging Party if she was going to pay. The Charging Party replied she would.

The Charging Party recalls that sometime in the first week of May, she told the Union steward that she could not pay the entire \$184.00, but could pay some then and the remaining amount the next week. According to the Charging Party, the Union steward told the Charging Party that she would call and tell the Union about the Charging Party's proposed payment schedule. The Charging Party does not recall the Union steward following up on this conversation. The Charging Party also asserts that she never specified any amounts that she planned on paying or agreed to a fixed date of payment.

When the Union did not receive the Charging Party's May 14 payment as of Monday, May 17, the Union faxed the Employer a request that the Charging Party be discharged. On May 18, the Employer informed the Charging Party that she was terminated. The Charging Party replied that she didn't understand how she could be fired since she paid her dues.⁶

In the Charging Party's original testimony, she claimed that it was not until May 18, following her discharge, that she received the two returned, misaddressed payment envelopes from the Post office. In her more recent testimony, the Charging Party states that she received the returned envelopes one or two days before she was terminated. In any event, it wasn't until after she was

⁶ The Union steward, who was present when the Charging Party was terminated, portrays a different account of this meeting. According to the Union steward, the Charging Party said at the termination meeting that she planned on paying the entire amount by that upcoming Friday (May 21).

discharged that the Charging Party attempted to contact the Union.

On May 18, immediately after her termination, the Charging Party drove to the Union's office to speak with the Union secretary/treasurer or the Union business agent, but neither person was in the office. She additionally left several phone messages for them. On May 19, the Charging Party returned to the Union office with the returned, sealed misaddressed envelopes. The Charging Party explained the misaddressed envelopes to the dues clerk and allowed the dues clerk to open the envelopes. According to the Charging Party, the May 7 envelope was empty and the May 14 envelope contained two checks; one dated May 7 for \$100.00 and the second dated May 14 for \$84.00.⁷ The Charging Party wrote out a new check for the amount of \$184.00 and paid her arrears. The dues clerk agreed to call the secretary/treasurer and report that the Charging Party paid her dues.

After the Charging Party left the Union office, she called the Employer and stated that there was a mistake in addressing the envelopes and all her dues were now paid. The Employer agreed to talk to the Union. On May 24, the Employer informed the Charging Party that it would not be rehiring her.

In addition to the instant case, the Charging Party also filed a charge alleging that the Employer violated Section 8(a)(3) and (1) of the Act by complying with the Union's termination request. The Region determined the charge was without merit as there was insufficient evidence to establish that the Employer had "reasonable grounds for believing" that the Union's termination request was unlawful.⁸

ACTION

We conclude that the Union violated Section 8(b)(1)(A) and (2) for causing the Charging Party's discharge by failing to meet the Philadelphia Sheraton notice requirements and for causing the Charging Party's discharge for nonpayment of a non-dues assessment. In this regard, we conclude that the Union's liability is not excused by the Charging Party's own actions, as there is insufficient

⁷ The Union dues clerk testified that the May 14 envelope was empty and the May 7 envelope contained two checks.

⁸ See Valley Cabinet & Mfg., 253 NLRB 98, 99 (1980), enfd. 691 F.2d 509 (9th Cir. 1982)(table).

evidence to support a finding that the Charging Party was a "free rider."

Under Philadelphia Sheraton, a union has the fiduciary duty to provide an employee with a precise amount of dues owed, the time period in question, the method of computation, and a reasonable opportunity to meet the dues obligation before seeking the employee's discharge under a union security clause.⁹

Here, the Union unlawfully failed to provide the Charging Party with an accurate statement of dues owed and the method of computation used before seeking her discharge. The Union's March 26 and April 27 letters and May 3 and 12 phone conversations collectively created ambiguity as to the precise amount owed, and lacked a statement of the method of computation. The Charging Party was informed on March 26 that she owed \$254.04 and that her dues were paid through September 30, 2003. On April 27 the Charging Party was notified that her arrearage had risen to \$293.42 and again her dues were paid through September 30, 2003. Upon calling the dues clerk on April 30, the Charging Party was told that she owed either \$184.00 as she claims or \$254.04 as the dues clerk alleges. On May 3, the Union asserted that the Charging Party owed \$254.04. However, on May 12, the dues clerk informed the Union steward that the Charging Party only owed \$184.00. The multiple conflicting notices provided by the Union fail to provide a single precise statement of dues owed or an accounting of the method of computation used as required by Philadelphia Sheraton, and is therefore violative of Section 8(b)(1)(A).

Additionally, Section 8(b)(2) of the Act precludes a Union from causing a discharge pursuant to a union security clause for a reason other than the employee's "failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." In Okalahoma Fixture Co.,¹⁰ the Board found the Union's request to discharge an employee for failure to pay both an initiation fee and a union-imposed assessment fee unlawful. The Board reasoned that an assessment fee is not "periodic" under the meaning of the Act and the Union violated 8(b)(2) by seeking to discharge the employee for nonpayment of this assessment.

⁹ 136 NLRB at 896. See also GreenTeam of San Jose, 320 NLRB 999, 1004 (1996), quoting Communication Workers Local 9509 (Pacific Bell), 295 NLRB 196 (1989).

¹⁰ 305 NLRB 1077 (1992).

As admitted by the Union, all of various totals of the Charging Party's arrearage included a one-time \$40.00 assessment fee imposed by the Union. The \$40.00 assessment fee does not qualify as either periodic dues or an initiation fee. Therefore, her subsequent discharge for failure to tender a total arrearage that included this assessment fee is unlawful.

The Union argues that despite its failure to comply with Philadelphia Sheraton notice requirements and the unlawful inclusion of an assessment fee, the Charging Party's discharge should nonetheless be found lawful, and that Union's conduct excused, because the Charging Party's actions are tantamount to those of a "free rider" seeking to avoid her obligation to pay dues.

The Board has defined a "free rider" as an employee who willfully and deliberately seeks to evade his or her union security obligations.¹¹ Negligence and inattention to union concerns are not the equivalent of a willful attempt to evade a lawful financial obligation.¹² In addressing a "free rider" in the context of a deficient Philadelphia Sheraton notice, the Board opined that the notice requirements set forth in Philadelphia Sheraton were not intended "to be so rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations as a union member."¹³ Rather, the requirements were established to ensure that "a reasonable employee will not fail to meet his obligation through ignorance or inadvertence, but will do so only as a matter of conscious choice."¹⁴ The Board further stated that, "the [union's] obligations to members under [Philadelphia Sheraton] will be relaxed only in extreme

¹¹ Teamsters Local 630 (Ralph's Grocery), 209 NLRB 117, 125 (1974).

¹² Helmsley-Spear, Inc., 275 NLRB 262, 263 (1985).

¹³ I.B.I. Security, Inc., 292 NLRB 648, 649 (1989) citing Teamsters Local 630 (Ralph's Grocery), above.

¹⁴ I.B.I. Security, Inc., above, citing Valley Cabinet & Mfg., 253 NLRB at 108.

circumstances. The evidence must disclose a conscious determination by the employee to frustrate payment."¹⁵

Here, although there are significant conflicts between the Charging Party's testimony and that of the dues clerk and the Union steward, even crediting the testimony of the Charged Party-Union's witnesses, there is insufficient evidence to support the allegation that Charging Party willfully and deliberately sought to evade her dues obligation. It is incontrovertible that the Charging Party signed multiple dues authorization cards during her employment, queried the Employer about her dues status with the Union, was consistently paying Union monthly dues at the time of her discharge, successfully made a \$25.00 partial payment towards her dues arrearage on May 7, and unsuccessfully attempted to make a full payment of her arrears by way of two misaddressed envelopes postmarked no later than May 14. The Charging Party may not have acted with the care and diligence that an ideal employee might exercise; nonetheless, there is insufficient evidence to indicate that she possessed the clearly conscious determination to frustrate payment necessary to categorize her as a "free rider".¹⁶

¹⁵ Operating Engineers Local 542 (Ransome Lift), 303 NLRB 1001, 1004 (1991).

¹⁶ See Service Employees Local 32B-32J, 289 NLRB 632, 632-633 (1988) (employee who failed to pay dues not a "free rider" even though substantially and frequently delinquent in arrears).

For the forgoing reasons, complaint should issue,
absent settlement.¹⁷

B.J.K

¹⁷ [FOIA Exemption 5